

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Modern Rules of Procedure for the	:	
Issuance of Advisory Opinions in	:	Docket No. RM2012-4
Nature of Service Proceedings	:	

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these Initial Comments pursuant to Order No. 1738 (May 31, 2013). GCA has participated in several recent nature-of-service cases, and as a general matter agrees that the traditional trial-type hearing model used in them may not be the one best adapted to current needs. The Commission has now proposed much more streamlined procedural rules, and in particular has (i) substantially curtailed discovery, and (ii) even more substantially limited the scope of sec. 3661 cases. It is in those two areas that GCA offers suggestions for improving the proposed rules.

I. DISCOVERY RULES

The Notice of Proposed Rulemaking (NPRM) proposes significant limits on discovery. GCA would agree that discovery, as ordinarily conducted under Rules 25 and 26, can be time-consuming and could interfere with achievement of the Commission's chosen 90-day deadline. We believe, however, that the limitations proposed in the NPRM could be redesigned to allow more effective information-gathering without significant delay.

A. *The 25-interrogatory limit.* GCA believes that making the 25-question limit (proposed Rule 87; Order No. 1738, pp. 17, 18) include followup as well as initial interrogatories could have unwelcome consequences.¹ Interrogatory responses are not invariably complete and informative. A party thus faces the choice of (i) “saving” some of its 25 interrogatories to use as followups, if needed, and thereby possibly forgoing useful areas of inquiry at the outset, or (ii) using its entire allotment for initial interrogatories, with the risk of receiving non-responsive, incomplete, or ambiguous answers which it then may not pursue further.

GCA would suggest that the Commission, instead, (i) institute a 25-question limit for *initial* interrogatories, but (ii) cease to allow followups as a matter of right. If a party found that answers to some of its initial interrogatories required supplementation or clarification, it would file a motion for leave to serve appropriate followups. The rule could require that any such motion be filed within, e.g., seven days of receipt of the answers and that the proposed followups be attached to it. The respondent would have, e.g., three days to respond to the motion. The Presiding Officer would grant the motion only if and to the extent that (s)he found that (i) the answers were in fact incomplete, non-responsive, or ambiguous, and (ii) the followups did not extend the scope of the initial interrogatories.

B. *Defining “interrogatory.”* With the allowable number of interrogatories sharply limited, it is necessary – as proposed Rule 87(a) recognizes – to define “interrogatory” in such a way as to prevent evasion of the limit. Some of the rule’s language as proposed, however, might be improved. The problem area, in GCA’s view, is the second sentence: “An interrogatory with subparts that are

¹ One possible consequence of a numerical limit, however designed, is that associations participating in an N-case may arrange for one or more of their members to intervene separately, with a view to a coordinated discovery program comprising multiple allowances of 25 interrogatories each. The Commission can, of course, deal with that situation under existing Rule 20(e); it might find, however, that the power to group intervenors with congruent interests would have to be used more often than has been true in the past.

logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory.” For the present, we assume that each interrogatory will in fact contain an identifiable “primary question” to which other sections are discernibly subordinate, though we also have a suggestion, explained below, for insuring that it will.

First, it is not entirely clear how literally the Commission means “logically and factually subsumed within the primary question” to be taken. In a strict sense, “logical and factual” subsumption of the subpart should mean that the answering the subpart would require no information not necessary to answer the primary question – in which case, of course, the subpart would be pointless. Presumably, then, the intent is simply to constrain each single interrogatory to a single subject of reasonably limited scope.

GCA would suggest, first, that this goal can be achieved without requiring subparts to be *both* logically and factually subsumed within the primary question. Suppose a party’s Interrogatory No. 1 read:

1. Please state how the Postal Service collects and records data for the XYZ cost system.

(a) Have the methods of collecting and/or recording these data been changed within the past 10 years?

(b) If your answer to 1(a) is other than an unqualified “no,” please describe fully each such change.

Arguably, the two subparts, (a) and (b), are not *factually* subsumed within the primary question (“Please state how . . .”), since they request information for past periods while the primary question asks how the Postal Service collects and records the data now. They would, however, be useful for interpreting the answer to the primary question and, in particular, for assessing whether the data now in the XYZ cost system are comparable to those for past years. To forestall problems of this kind, GCA would suggest that the rule not require the relationship to be

both logical and factual before the subpart may be counted as a component of a single interrogatory.

GCA's second point concerns the phrase "necessarily related to the primary question." Some such standard is certainly appropriate, given the Commission's objective; the issue is how strictly "necessarily" is to be taken. At the limit, "necessarily" could mean that the primary question is meaningless or unanswerable without an answer to the subpart – i.e., that the necessity involved is logical. We assume that the Commission does not intend anything so extreme, but simply that a subpart not reasonably clearly related to the primary question cannot be rolled in with it to produce a single interrogatory for purposes of the numerical limit. If that is the intent, however, we are concerned that "necessarily" may cause avoidable problems of interpretation. GCA's suggested substitute language, below, attempts to avoid such problems.

Finally, while we would agree that ideally each interrogatory should have a readily perceptible scope in the form of a "primary question," the proposed rule seems to assume – but does not guarantee – that this will be true. The Commission may wish to require such a feature, to simplify the task of deciding whether a multipart question qualifies as a single interrogatory.

GCA therefore suggests a possible revision of proposed Rule 87(a) (deleted language struck through, new language underscored):

(a) *Service and contents.* (1) In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant in a proceeding may propound to the Postal Service 25 written, sequentially numbered initial interrogatories, by witness, requesting non-privileged information relevant to the subject matter of the proceeding. Each such interrogatory must contain a primary question or statement of scope, which shall clearly delimit the subject of the interrogatory. For an interrogatory containing subparts to be counted as a single interrogatory, each such subpart must bear a clearly discernible logical or factual relation to the primary question or statement of scope, and shall not in any way expand such primary ques-

~~tion or statement of scope. An interrogatory with subparts that are logically and factually subsumed within and necessarily related to the primary question will be counted as one interrogatory.~~ The Postal Service shall answer each interrogatory and furnish such information as is available. The participant propounding the interrogatories shall file them with the Commission in conformance with §§ 3001.9 through 3001.12 of this part.

~~(2) Follow-up interrogatories may be filed only upon grant of a motion for leave to do so. The Presiding Officer shall grant such motion only if and to the extent that the answers to the interrogatories in question are non-responsive, incomplete, or ambiguous. A follow-up interrogatory may not expand the scope of the initial interrogatory. The proposed follow-up interrogatories shall be attached to the motion for leave to file. Such motion shall be filed within 7 days of receipt of the answer(s) in question. The Postal Service may respond to the motion within 3 business days. Follow-up interrogatories to clarify or expand on the answer to an earlier discovery request may be filed after the period for intervenor discovery on the Postal Service case ends if the motion for leave to file them is inter-~~
~~rogatories are filed within 7 days of receipt of the answer to the previous interrogatory. In extraordinary circumstances, a motion for leave to file follow-up interrogatories may be filed not less than 6 days prior to the filing date for the participant's rebuttal testimony.~~

C. Institutional interrogatories. One clarification to the NPRM would be helpful. Proposed Rule 87(a) refers to “sequentially numbered interrogatories, by witness[.]” This formulation seems to leave uncertain the status of institutional interrogatories to the Postal Service. These have been useful in past cases; in Docket No. N2010-1, for example, more than 100 such interrogatories and answers were designated for the record². If under the proposed rule, interrogatories must be captioned “by witness,” it is not clear whether an interrogatory (i) may still be addressed to the Postal Service as an institution, as before, (ii) must be addressed to the institutional witness called for by proposed Rule 83(b)(6), or (iii) must be directed to one of the subject-area witnesses. If institutional interrogatories to the Service are no longer permitted, perhaps the Rule, or at least the final rulemaking order, should say so explicitly.

² See Docket N2010-1, Tr. 7/1619-1620. This count does not include interrogatories originally addressed to a witness but redirected by the Postal Service to itself.

II. LIMITATION OF SCOPE OF PROCEEDINGS

In GCA's view, the most significant change proposed in the NPRM is the policy of restricting the case to the Postal Service's plan and excluding alternatives proposed by others. One need go no further back than Docket N2012-1 to see the value of alternative proposals, both to the Commission in arriving at its decision and to users of the published opinion.³ That said, we recognize that since the Postal Service must have the same procedural rights and opportunities as other parties, the presentation of alternatives could extend the case well past the Commission's 90-day limit.

To alleviate this problem, the Commission proposes what is potentially a good compromise: an undertaking to consider some alternative proposals via public inquiries or special studies. This approach could at least insure that worthwhile alternatives are appropriately analyzed and described in a published document, even though this could occur after the formal advisory opinion has been issued.

GCA would suggest, however, that, as proposed, Rule 3001.72 does not exploit the possibilities of the public inquiry or special study as fully as it should. The rule states that "[i]f, in any proceeding, alternatives or related issues of significant importance arise," the Commission may institute a public inquiry or special study. But it is not clear how such alternatives or issues *could* arise in a proceeding limited by rule to the Postal Service proposal.

Proposed Rule 90(b) limits rebuttal evidence to the Postal Service's proposal; section 90(a) does the same for surrebuttal cases. Rule 93(b)(3) would impose a corresponding limit on briefs. Proposed Rules 92(e)(1) and (f)(3), governing the conduct of hearings, convey the same idea. It would seem, therefore,

³ See, e.g., PRC Op. N2012-1, pp. 26 et seq

that almost any attempt to raise an alternative would be subject to objection, and exclusion, under the proposed rules. With no opportunity to assess the likely merits of an alternative on an informed basis, it is not entirely clear how the Commission could decide whether the alternative was (or was not) worth pursuing in a public inquiry or special study,

GCA would suggest that the Commission reinforce its public-inquiry-or-special-study policy by formalizing it as part of its sec. 3661 rules. This could be done by providing that a participant may, during the proceeding as well as afterwards, file a petition for institution of a public inquiry.⁴ The petition should describe the alternative in sufficient detail that the Commission can decide whether it is worth pursuing, and should present, or at least refer to, factual material the petitioner believes makes the alternative useful. Because the proceeding being petitioned for is not the one subject to the rules restricting subject matter, the petition would be consistent with the Commission's aim to limit N-cases to the Postal Service plan.

Following is an illustrative revision of proposed Rule 72(b) incorporating the foregoing suggestion:

(b) Public inquiries and Special studies. Advisory opinions shall address the specific changes proposed by the Postal Service in the nature of postal services. If, in any proceeding, alternatives or related issues of significant importance arise, the Commission may, in its discretion, undertake an evaluation of such alternative or issues by means of special studies, public inquiry proceedings, or other appropriate means. A participant who believes that such an alternative or issue should be raised may, at any time after the Postal Service has filed its request, file a petition for public inquiry. Such petition shall describe in as much detail as possible the alternative or issue and shall be accompanied by such factual material (or by references thereto if the material is publicly available) as will usefully clarify the nature and significance of the alternative or issue. The Commission will act on such petition as promptly as feasible, and may (without

⁴ We are assuming that what distinguishes a special study from a public inquiry is that the special study does not necessarily involve public participation. Presumably a participant wishing to raise an alternative would also wish to make a presentation concerning it, and we therefore suggest that the appropriate pleading would be a petition for such an inquiry.

limitation) order a public inquiry or institute a special study. The petition, and any materials included with it which are not otherwise part of the record of the underlying case, will be excluded from that record and from consideration in the case.

The time constraint expressed in the first added sentence is meant to forestall the filing of a petition during the pre-filing phase described in proposed Rule 81. As proposed Rule 81(b) makes clear, one purpose of the pre-filing phase is to allow the Service to consider, and perhaps adopt, parties' suggested changes to its plan. There seems to be no good reason to let a proponent short-circuit this possibility by proposing its desired change through a petition for a separate public inquiry before the Postal Service has settled on the final shape of its proposal and filed it with the Commission.

III. FIELD HEARINGS

At p. 11 of the NPRM, the Commission states that in most cases there will be no field hearings in sec. 3661 proceedings. We take this as a statement of policy, since the proposed rules are silent concerning field hearings. GCA does not disagree with this policy choice, since it does leave open the possibility that, where genuinely useful, field hearings might still be held. We do have one suggestion for their conduct, in the event that they are found necessary in some future case.

Among the objections to field hearings are that they are time-consuming and do not produce evidence on which the Commission may rely.⁵ Both points – especially the second – have considerable validity. We would suggest, however, that just because field hearings do not produce record evidence in the statutory sense, there is no need for Commissioners to preside at them. The Commission's practice of sitting en banc originated with a decision to eliminate the intermediate decision phase in cases subject to former 39 U.S.C. sec. 3624(a). The

⁵ These points are made, for example, in the Postal Service's Initial Comments, pp. 25-27.

Administrative Procedure Act provides that where "the agency did not preside at the reception of the evidence"⁶ there shall be an intermediate decision by an administrative law judge. To eliminate this step, the Commission adopted the practice of hearing the evidence en banc.

Since a field hearing does not, and is not meant to, produce "evidence" in the sense contemplated by the APA – i.e., record evidence on which a decision may rely – it is not necessary for the agency to preside at it in order to satisfy the APA provision. If a field hearing is needed, therefore, a Commission staff member not otherwise responsible for the N-case in question could be authorized and directed to conduct the hearing and cause it to be transcribed. Thus Commissioners, and staff assigned to the case, would not be diverted from the proceedings in Washington while the field hearing went on.

IV. CONCLUSION

GCA does not disagree with the general thrust of the proposed rules, though we believe that, in complex or highly controversial cases, completing the entire proceeding in 90 days will be a challenging task. The suggested changes described above are meant to help maximize the informational and analytical benefit derivable from such a streamlined, time-limited proceeding.

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Respectfully submitted,

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⁶ 5 U.S.C. sec. 557(b).